

**FILED**

**FEB - 6 2018**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

In re:	)	Case No. 09-29162-D-11
	)	
SK FOODS, L.P.,	)	
	)	
	)	
Debtor.	)	
<hr/>		
BRADLEY D. SHARP, Chapter 11	)	Adv. Pro. No. 09-2543-D
Trustee,	)	
	)	Docket Control No. TJD-8
Plaintiff,	)	
	)	
v.	)	
	)	
CSSS, LP, a California limited	)	DATE: January 10, 2018
partnership,	)	TIME: 8:30 a.m.
	)	DEPT: D
Defendant.	)	

**This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.**

**MEMORANDUM DECISION**

On January 25, 2014, this court issued a judgment in favor of the plaintiff, Bank of Montreal ("BMO"), and against Gerard Rose ("Rose") and Larry Lichtenegger ("Lichtenegger") (collectively, the "defendants") jointly and severally in the amount of \$350,000. The judgment was based on the court's order of January 21, 2014 granting BMO's motion for summary judgment against the defendants as respondents to a motion for contempt (the "contempt motion") brought by BMO's predecessor in interest in this adversary proceeding, Bradley Sharp (the "trustee"),

1 chapter 11 trustee in the case of SK Foods, L.P. ("SK Foods").  
2 The defendants appealed from the judgment. The district court  
3 affirmed the judgment; however, the Ninth Circuit Court of  
4 Appeals reversed and remanded the matter to this court, finding  
5 that this court had made credibility determinations, which are  
6 inappropriate on a motion for summary judgment.

7 Therefore, this court conducted an evidentiary hearing/trial  
8 on the date and at the time set forth above. The parties agreed  
9 at the last status conference held before the evidentiary  
10 hearing/trial that the evidentiary record was closed. That is,  
11 they agreed that the supporting declarations and exhibits  
12 submitted by each party prior to the appeals would be admitted  
13 into evidence and the parties would submit no further direct  
14 evidence, but each would have the opportunity to cross-examine  
15 the other's witnesses.

16 At the evidentiary hearing/trial, Lichtenegger sought to  
17 call a new witness, attorney Malcolm Segal. After discussion,  
18 Lichtenegger made an offer of proof as to what Segal would  
19 testify to and BMO did not object. The substance of the offer of  
20 proof is described in note 11 below. In addition, at the  
21 evidentiary hearing/trial, Lichtenegger took the stand and  
22 testified under oath subject to cross-examination. Thus, the  
23 court was able to observe his conduct and demeanor and to assess  
24 his credibility.

25 Having considered the declarations and exhibits filed by the  
26 parties, together with their witnesses' testimony on cross-  
27 examination at the evidentiary hearing/trial, the court concludes  
28

1 that the judgment will stand, as subsequently satisfied in part.<sup>1</sup>

2 Applicable Legal Standards

3 The standard for finding a party in civil contempt is well  
4 settled: "The moving party has the burden of showing by clear  
5 and convincing evidence that the contemnors violated a specific  
6 and definite order of the court. The burden then shifts to the  
7 contemnors to demonstrate why they were unable to comply." FTC  
8 v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999),  
9 quoting Stone v. City & County of San Francisco, 968 F.2d 850,  
10 856 n.9 (9th Cir. 1992) (internal citations omitted). "[The  
11 contemnors] must show they took every reasonable step to comply."  
12 Stone, 968 F.2d at 856 n.9. "Intent is irrelevant to a finding  
13 of civil contempt and, therefore, good faith is not a defense."  
14 Id. at 856.

15 The TRO and Lichtenegger's Conduct

16 BMO seeks entry of a judgment against Lichtenegger as a  
17 sanction for his alleged violation of this court's Temporary  
18 Restraining Order and Order to Show Cause re Preliminary  
19 Injunction, filed August 24, 2009 (the "TRO"). The TRO (1)  
20 restrained CSSS, LP, dba Central Valley Shippers ("CVS"), its  
21 officers, agents, servants, employees, and attorneys, and those  
22 in active concert or participation with CVS or with its officers,  
23 etc., from, among other things, moving certain equipment referred  
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25  
26 1. After the remand, BMO and Rose entered into a settlement  
27 pursuant to which BMO retained \$100,000 of the funds Rose had  
28 deposited with BMO pending the appeals. Thus, the amount  
remaining due on the judgment is \$250,000 plus interest. The  
settlement was approved by this court as a good faith settlement,  
on notice to Lichtenegger, and Rose was dismissed from the  
adversary proceeding.

1 to by the parties as a Drum Line to any location outside of  
2 California; and (2) ordered CVS to produce a corporate designee  
3 to testify at a deposition about, among other things, the  
4 location of the Drum Line and any plans to move it. BMO contends  
5 Lichtenegger violated both of these provisions of the TRO. The  
6 court agrees.

7 As the following discussion shows, Lichtenegger knew well  
8 before the Drum Line left California that the trustee had gotten  
9 wind of the intention of Scott Salyer ("Salyer"), the principal  
10 of SK Foods, to ship the Drum Line to New Zealand, and  
11 Lichtenegger knew the trustee was trying to stop the shipment.  
12 Lichtenegger conveyed to the trustee's attorney, before the  
13 hearing on the trustee's TRO application, a statement that the  
14 Drum Line had already shipped -- more specifically, that it was  
15 "already gone,"<sup>2</sup> whereas at the time of that communication,  
16 Lichtenegger had not confirmed that statement, and in fact, had  
17 undertaken no investigation to confirm it. Lichtenegger soon  
18 learned -- again, before the hearing -- that the Drum Line had in  
19 fact not shipped and would not ship for several days after the  
20 TRO hearing, yet he failed to take any steps to correct the  
21 inaccurate statement he had made to the trustee's attorney. He  
22 failed to do so despite the fact that he knew the trustee's  
23 attorney had conveyed his inaccurate statement to the court.  
24 Lichtenegger proceeded to do everything he could think of to  
25 distance himself from the situation so as to create plausible  
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27  
28 2. Lichtenegger is the one who actually told the trustee's  
attorney the Drum Line had already shipped; he did so at Rose's  
request.

1 deniability; the court, instead, finds his deniability entirely  
2 implausible.

3       The events relevant to the contempt motion took place in  
4 August and September of 2009, beginning August 21, when  
5 communications began among Rose, Lichtenegger, Salyer, and other  
6 members of Salyer's legal team concerning the TRO application and  
7 the status of the shipment of the Drum Line to New Zealand.<sup>3</sup> On  
8 Friday, August 21, these communications took place:

9       • 2:45 p.m. The trustee's counsel, Michael Carlson  
10 ("Carlson"), called Rose and told him he would be filing an  
11 application for a temporary restraining order that day to prevent  
12 the movement of the Drum Line and would be appearing in court on  
13 Monday, August 24, at 11:00 a.m. on the application. Rose asked  
14 Carlson to email him the moving papers; Carlson did that, and  
15 Rose retrieved them later that evening at his home and forwarded  
16 them by email to Salyer and three attorneys -- two who  
17 represented Salyer in one capacity or another, Malcolm Segal and  
18 Paul Pascuzzi, and one who represented certain of Salyer's  
19 related entities, Donald Putterman. Carlson had also emailed the  
20 moving papers to Lichtenegger at 4:23 p.m. the same day.<sup>4</sup>

21       Rose told Carlson in the 2:45 p.m. conversation that he was  
22 leaving California early the next morning for a week-long  
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24       3. The components of the Drum Line were sent in containers  
25 by truck from a ranch in the Central Valley of California to the  
26 Port of Oakland, California, and from there, were shipped to New  
27 Zealand. The ship with the Drum Line containers did not leave  
the Port of Oakland for New Zealand until August 31, ten days  
after these communications began.

28       4. Lichtenegger acknowledged at his deposition he received  
it that day and read it, either then or within 24 hours.

1 vacation, and thus, would be unable to attend the Monday morning  
2 hearing. Carlson replied that the hearing would go forward  
3 anyway.

4 • According to Rose, the same afternoon, after he had spoken  
5 with Carlson, Rose called Segal and "learned from him that the  
6 Drum Line had already been shipped out of the country, and that  
7 any TRO would be moot."<sup>5</sup>

8 • As Rose was going to be on vacation from early the next  
9 morning, August 22, through the following week, he called  
10 Lichtenegger and asked him to make a special appearance on Monday  
11 morning to oppose the TRO application. Rose testified in his  
12 declaration that he "arranged to have Mr. Lichtenegger appear  
13 specially for [Rose] at the hearing";<sup>6</sup> he also said Lichtenegger  
14 responded that he had another matter scheduled for Monday  
15 morning, but that he would appear at the TRO hearing if Rose  
16 could set up a telephonic appearance for him, which Rose then  
17 did.<sup>7</sup> According to Lichtenegger, and not disputed by Rose, Rose  
18 also asked him to call and tell Carlson that the Drum Line had  
19 already shipped and that the TRO application was moot. According  
20 to Lichtenegger, Rose said he was too upset by Carlson's "rude  
21 treatment" in their earlier conversation to make the call  
22 himself.<sup>8</sup>

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5. Gerard A. Rose Decl., filed Sept. 19, 2013, at 5:8-9.

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6. Rose Dep., BMO 511.

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27 7. Lichtenegger's version is that he told Rose he had a  
scheduling conflict, but he would do what he could to help Rose.

28

8. Larry J. Lichtenegger Decl., filed Sept. 25, 2013  
("Lichtenegger Decl."), at 2:9.

1       • 3:20 p.m. Salyer emailed Segal, Pascuzzi, Rose,  
2 Lichtenegger, and another member of Salyer's legal team, Gary  
3 Perry -- stating that, as they had heard, the trustee was going  
4 to try to get a TRO against CVS; Salyer suggested they "attack"  
5 the trustee and his attorneys for violating a settlement under  
6 which Salyer's daughters' trusts, "which are the sole owners of  
7 CVS," were released. Salyer stated it was "[t]ime to pull the  
8 gloves off and start asking for Sanctions and restraining orders  
9 against the Trustee and his goons." BMO 375.

10       • 3:25 p.m. Lichtenegger left the following voicemail  
11 message for Carlson:

12       Mr. Carlson, my name is Larry Lichtenegger. I'm an  
13 attorney down in Carmel. I've been asked to specially  
14 appear on Monday morning in regard to your Application  
15 for a TRO. I wanted to inform you that I've  
16 investigated and confirmed that the drums [sic] shipped  
on Thursday -- they are already gone. That makes your  
application for a TRO moot. You may have other issues,  
but not a TRO. My phone number is 831-626-2801. Thank  
you.<sup>9</sup>

17       It is undisputed that, as of August 21, the Drum Line was  
18 not already gone and the TRO application was not moot.<sup>10</sup>

19       • 3:29 p.m. Segal emailed Salyer, Pascuzzi, Perry, Rose,  
20 and Lichtenegger, stating, "I just spoke to Larry [Lichtenegger]  
21 and Gerard [Rose]. If the goods have already shipped, the TRO  
22  
23  
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25       9. Michael M. Carlson Second Suppl. Decl., filed Sept. 1,  
26 2009, BMO 176 ("Carlson Second Decl."), at 3:19-23, emphasis  
added.

27       10. By August 21, the components of the Drum Line had been  
28 transported by truck from the Central Valley to Oakland, and were  
in the Port of Oakland awaiting documentation that would allow  
them to be shipped to New Zealand.

1 application is moot." BMO 377 (emphasis added).<sup>11</sup>

2 • 3:30 p.m. Responding to Salyer's 3:20 p.m. email,  
3 described above, Lichtenegger emailed Salyer, Segal, Pascuzzi,  
4 Perry, and Rose, stating, "GAR [Rose] and I are dealing with this  
5 now." BMO 378.<sup>12</sup>

6 • 3:31 p.m. Responding to Segal's 3:29 p.m. email,  
7 Lichtenegger emailed Salyer, "Confirm drums shipped on Thursday?"  
8 BMO 380.<sup>13</sup>

9 • 4:11 p.m. Carlson returned Lichtenegger's call. At that  
10 time, despite Lichtenegger's 3:31 p.m. question to Salyer seeking  
11 confirmation, a question that remained unanswered at 4:11 p.m.,  
12 Lichtenegger took the liberty of telling Carlson it was his  
13 understanding the Drum Line had shipped the previous day;  
14 Lichtenegger also asked that the TRO hearing be continued "as  
15

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16 11. At the evidentiary hearing/trial, Lichtenegger made an  
17 offer of proof regarding Segal's expected testimony, which BMO  
18 did not object to. Thus, BMO stipulated "that Mr. Segal told Mr.  
19 Lichtenegger in their initial call with Mr. Rose that the Drum  
20 Line had shipped." The court accepts that statement as true, but  
21 finds it significant that when Segal referred to the telephone  
22 conversation immediately after it occurred, he used the words "if  
the goods have already shipped" (emphasis added). Similarly, it  
is important that two minutes later, Lichtenegger emailed Salyer  
asking him to confirm the Drum Line had shipped, and that  
Lichtenegger followed up with Salyer on the issue two days later,  
on Sunday, August 23. See below.

23 12. That Lichtenegger and Rose were "dealing with" the  
24 situation implies more involvement and collaboration than  
25 Lichtenegger's agreement to make a special appearance, and even  
than his agreement to make the phone call to Carlson that Rose  
was too upset to make.

26 13. Lichtenegger sent this email because "[he] had read  
27 Segal's email and wanted to confirm what I had been told."  
28 Lichtenegger Decl. at 2:13-14 (emphasis added). This is an  
admission that Lichtenegger had not confirmed the statements he  
told Carlson in his 3:25 p.m. voicemail message that he had  
"investigated and confirmed."



1 there was no longer an emergency."<sup>14</sup> Carlson responded that the  
2 hearing would go forward as scheduled. According to Carlson,  
3 Lichtenegger confirmed he would be appearing by CourtCall at the  
4 hearing on behalf of CVS.<sup>15</sup>

5 • 4:37 p.m. Carlson emailed Rose and Lichtenegger a copy of  
6 Carlson's supplemental declaration in support of the TRO  
7 application, setting forth the text of Lichtenegger's 3:25 p.m.  
8 voicemail message, quoted above.

9 • 4:38 p.m. Rose and Lichtenegger had a four-minute cell  
10 phone conversation.

11 Thus, the undisputed facts are that by the end of the day on  
12 Friday, August 21, both Rose and Lichtenegger had received copies  
13 of the TRO application and related documents by email; Carlson  
14 had told both of them the hearing would go forward Monday  
15 morning; and Lichtenegger had twice informed Carlson, once by  
16 voicemail (at Rose's direction) and later in a telephone  
17 conversation, that the Drum Line had already shipped, and  
18 therefore, that the TRO application was moot.<sup>16</sup> Lichtenegger also  
19 knew by the end of the day Friday that Carlson had informed the  
20

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21 14. Larry Lichtenegger Decl., filed Sept. 1, 2009, BMO 133,  
22 ("Lichtenegger 9/1/09 Decl."), at 2:17-18.

23 15. Carlson Second Decl., at 3:25-26.

24 16. Again, the second of those statements -- in the 4:11  
25 p.m. telephone conversation -- was made at a time when  
26 Lichtenegger knew he needed confirmation of the shipment and had  
27 sought it but had not received an answer. Yet he did not qualify  
28 his statement to Carlson -- he did not say "I think the Drum Line  
has already shipped" or "I have heard it has already shipped and  
I'm awaiting confirmation"; he simply said it was his  
understanding the Drum Line had shipped the previous day, and  
thus, he asked that the hearing be continued as "there was no  
longer an emergency."

1 court of Lichtenegger's unqualified statement that he "[had]  
2 investigated and confirmed that the drums [sic] shipped on  
3 Thursday -- they [were] already gone." In other words,  
4 Lichtenegger knew Carlson had informed the court of his statement  
5 that he had investigated and confirmed information he had in fact  
6 not yet confirmed -- information Lichtenegger knew went to the  
7 very heart of the relief the trustee would be seeking from the  
8 court Monday morning.

9 Lichtenegger supplemented his declaration testimony at the  
10 evidentiary hearing/trial. He testified as regards Segal's  
11 statement that the Drum Line "had shipped" that he believed that  
12 to be true and in good faith transmitted that information to  
13 Carlson. He did not explain or address his prior statement to  
14 Carlson that he had "investigated and confirmed" the information  
15 at the time he used those words; indeed, it is clear he had only  
16 Segal's word for it.

17 Presumably, however, Segal's email using the words "if the  
18 goods have already shipped" raised a concern for Lichtenegger  
19 that the information might not be accurate after all. Thus, on  
20 Sunday, August 23, the following transpired:

21 • 12:45 p.m. Lichtenegger emailed Salyer asking him to call  
22 because he "need[ed] some info to a decision" (presumably, in  
23 order to come to a decision). BMO 384.

24 • 4:40 p.m. Salyer emailed Lichtenegger: "Equipment does  
25 not ship out until Wednesday earliest." BMO 385.

26 • 4:47 p.m. Salyer emailed Lichtenegger: "Departs  
27 Thursday." BMO 388.

28 / / /

1 Faced with the seemingly direct contradiction between the  
2 statement in his Friday voicemail message that the Drum Line had  
3 "shipped" the day before and Salyer's Sunday emails that it would  
4 not "ship out" until several days later, Lichtenegger testified  
5 in his declaration he had a telephone conversation with Salyer  
6 that afternoon, Sunday, August 23, after Salyer's emails, in  
7 which Salyer told him the Drum Line "had indeed shipped from CVS  
8 the previous week." Lichtenegger Decl. at 3:13-14. This is a  
9 truncated version of testimony Lichtenegger prepared in the  
10 spring of 2011 which was not used at the time but which  
11 Lichtenegger submitted as an exhibit in opposition to the summary  
12 judgment motion. In that testimony, Lichtenegger stated that in  
13 their August 23 telephone conversation, Salyer told him the Drum  
14 Line "had indeed shipped from CVS the previous week and was  
15 currently at the port awaiting departure."<sup>17</sup> Thus, whereas  
16 Lichtenegger claims he knew from that telephone conversation that  
17 the Drum Line had "shipped" from CVS, he also knew it was still  
18 in port "awaiting departure."

19 Lichtenegger claimed in his declaration he then asked Salyer  
20 "if the shipment could be stopped and was told that it could not  
21 be stopped as it was already in transit." Lichtenegger Decl. at  
22 3:15-16. Lichtenegger added that he "briefly discussed the  
23 nature of the TRO pending proceeding and [Salyer's] duty to stop  
24 the shipment if he could." Id. at 3:17-18. Lichtenegger stated  
25 he "knew nothing of the nature of seaboard shipping and had no  
26 reason to disbelieve [Salyer] when he said he could not stop it."

27

28 17. Lichtenegger's Exhibits, filed Sept. 25, 2013, Ex. H,  
at 2:24-25.

1 Id. at 3:18-19. Thus, "it did not appear important to know where  
2 in transit the Drum Line containers were if the shipment could  
3 not be stopped" (id. at 3:22-23), so he did not ask. He added he  
4 had no one else to ask besides Salyer and Rose, whom he claimed  
5 he was unable to reach; he apparently did not try to contact  
6 Segal, who had been the source of the "if it has shipped"  
7 comment, or Pascuzzi.<sup>18</sup>

8 Thus, Lichtenegger knew that what he had earlier assured  
9 Carlson he had "investigated and confirmed" -- that the Drum Line  
10 was "already gone" -- was unequivocally false. Yet he did not  
11 call or email Carlson to correct that statement or to qualify it  
12 in any way. Further, Lichtenegger cancelled his CourtCall  
13 appearance, did not appear at the Monday morning hearing, on  
14 August 24, and did not in any other way or at any other time  
15 attempt to correct or qualify the statement he knew had been  
16 conveyed to the court: the statement that the Drum Line was  
17 already gone.

18 \_\_\_\_\_  
19 18. At the evidentiary hearing/trial, Lichtenegger merely  
20 confused matters when, citing dictionary definitions of the verb  
21 "to ship" as including various forms of transportation, he  
22 suggested it was accurate to state that the Drum Line "had  
23 shipped" by August 21 because it had been packed in containers  
24 and put on trucks that had left Visalia, California. That  
25 testimony conflicts with his declaration testimony, where he  
26 referred only to his ignorance of seaboard shipping. It also  
27 casts doubt on his ready acceptance of Salyer's statement that  
28 the shipment could not be stopped and Lichtenegger's casual  
conclusion that it did not seem important to know where in  
transit the Drum Line was. Finally, in light of the request in  
the TRO application to restrain the affected persons and entities  
from "moving [the Drum Line] to a location outside California,"  
which Lichtenegger has acknowledged he read either August 21 or  
August 22, his testimony at the evidentiary hearing/trial that in  
his mind the word "shipping" included leaving Visalia by truck  
merely reinforces the court's conclusion, discussed below, that  
Lichtenegger was and is simply looking for cover -- for plausible  
deniability.

1        Instead, he unilaterally concluded there was nothing he  
2 could do. Lichtenegger stated in a declaration filed after the  
3 TRO hearing, "I decided that my appearance at the [August 24]  
4 hearing, if in fact one would occur, was useless as there was  
5 nothing I could do to aid the court or any of the parties in this  
6 dispute." Lichtenegger 9/1/09 Decl. at 2:27-3:2. Of course,  
7 there was much Lichtenegger could have done to aid the court --  
8 he could have appeared on August 24 and told the court the truth  
9 -- that the earlier information he had conveyed to Carlson, which  
10 he knew Carlson had conveyed to the court, was incorrect, and  
11 that the Drum Line had in fact not left the country and would not  
12 for several days. And that is exactly what Lichtenegger did not  
13 want to have to do.<sup>19</sup>

14        Lichtenegger claimed in his declaration he emailed Salyer at  
15 12:45 p.m. Sunday, August 23, because "if the Drum Line was truly  
16 on its way and could not be stopped, I would just not attend the  
17 hearing as there was nothing I could do to aid the situation."

18 \_\_\_\_\_  
19        19. At the evidentiary hearing/trial, Lichtenegger  
20 testified that, given Salyer's attitude, there was nothing he  
21 could have done to stop the shipment of the Drum Line because he,  
22 Lichtenegger, was not in a position of authority and Salyer was  
23 not going to take instructions from him anyway. The court finds  
24 that to be an insufficient excuse for his failure to take any  
25 steps toward stopping the shipment, as required by the TRO. He  
26 might have ensured the TRO was served on Salyer; he might have  
27 contacted Segal or Pascuzzi, as well as Salyer, to discuss the  
28 matter; he might have supplied Salyer's name to Carlson as an  
individual with knowledge of the "location, storage and condition  
of the Drum Line and any plans, intentions or efforts to . . .  
transfer or move" it, as also required by the TRO. He did none  
of those things.

26        Further, if Lichtenegger believed Salyer would not take  
27 instructions from him in any event; that is, if he believed  
28 Salyer would not comply with a court-issued TRO, why did  
Lichtenegger formally substitute into the case as counsel for CVS  
just three weeks later?

1 Lichtenegger Decl. at 3:4-6. This testimony is undercut by the  
2 fact that when Lichtenegger and Rose spoke on Friday afternoon  
3 and agreed that Lichtenegger would make the special appearance,  
4 Lichtenegger and Rose claim to have been already under the  
5 impression the Drum Line was gone. Thus, although Lichtenegger  
6 already viewed the TRO application as moot (and had so informed  
7 Carlson), he nevertheless planned, as of Friday afternoon, to  
8 make a telephonic appearance at the hearing. That fact conflicts  
9 with his testimony that he decided he would not appear "if the  
10 Drum Line was truly on its way and could not be stopped."

11       The only logical conclusion to be drawn from this  
12 inconsistency is that when Lichtenegger thought the Drum Line was  
13 already gone, he planned to attend the hearing -- presumably, to  
14 tell the court the TRO application was moot -- and it was only  
15 after Salyer informed him, on Sunday afternoon, that the Drum  
16 Line was still "at the port awaiting departure" and "would not  
17 ship out until Wednesday earliest" that Lichtenegger changed his  
18 mind and decided not to appear. The court has no trouble  
19 concluding that the only reason Lichtenegger cancelled his  
20 CourtCall appearance was so that he, Rose, and Salyer could  
21 assert they did not have absolute and specific knowledge of the  
22 issuance of the TRO and of its terms. This, they hoped, would  
23 provide Salyer with "cover," or plausible deniability, for  
24 failing to comply with the TRO and Lichtenegger and Rose with  
25 cover for failing to take "every reasonable step" to ensure that  
26 Salyer complied with it.

27       Lichtenegger claims his decision was influenced in part by  
28 his Friday afternoon telephone conversation with Carlson, in

1 which Carlson told him the transcript of Lichtenegger's earlier  
2 voicemail message would be provided to the court, adding that  
3 anything Lichtenegger said would be used to hold him or anyone  
4 else who violated the TRO responsible. Lichtenegger claims this  
5 conversation "upset" him, which he says was an "emotional  
6 condition" that contributed to his decisions "not to be involved  
7 with the issues surrounding the Drum Line shipment" (Lichtenegger  
8 Decl. at 2:22-24) and not to attend the hearing. It also,  
9 allegedly, led Lichtenegger "to do nothing when [Carlson's]  
10 emails, faxes and Fed-Ex packages started coming in." Id. at  
11 2:27-28.<sup>20</sup> Thus, he claims to have deliberately not read  
12 Carlson's emails, faxes, or overnight mail; in fact, he went so  
13 far as to unplug his fax machine when Carlson's faxes started  
14 coming in. In this way, if he is to be believed, Lichtenegger  
15 hid his head in the sand and he did so at his peril.<sup>21</sup>

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17 20. It is undisputed that Carlson served the application  
18 for the TRO and supporting papers on both Lichtenegger and Rose  
19 by email on August 21. It is also undisputed that Carlson served  
20 the TRO itself, as issued by the court, on Lichtenegger and Rose  
21 by mail and email the day it was issued, August 24, and that the  
22 next day, August 25, Carlson wrote to Lichtenegger and Rose, by  
23 fax, email, and overnight mail, with admonitions about obeying  
24 the TRO.

21 21. Lichtenegger goes so far as to admit that he ignored  
22 Carlson's emails, mail, and faxes because he was afraid that  
23 responding to them "would subject [him] to the responsibility  
24 Carlson notified [him] of on August 21st." Lichtenegger Decl. at  
4:12-13.

24 Further, whereas he had said in his declaration, in  
25 relatively casual fashion, that he had no reason to disbelieve  
26 Salyer, at the evidentiary hearing/trial, he testified that  
27 Salyer's attitude, and in particular, his aggressiveness, had  
28 contributed to his decision not to appear at the TRO hearing and  
not to be further involved. (At the evidentiary hearing/trial,  
he testified, "I didn't want to read them [the TRO papers]. I  
didn't want to be involved. I didn't want to be responsible.")  
And at the hearing on the trustee's summary judgment motion, he



1        Assuming for the sake of argument only that Lichtenegger did  
2 not actually see the TRO, that is not sufficient to protect him  
3 from the consequences of ignoring it. First, there is the  
4 obvious fact that if a TRO could be evaded merely by refusing to  
5 look at it, no TRO would ever have teeth. Thus, under the  
6 applicable rule, it is not necessary that a restraining order or  
7 injunction be personally served on an individual in order to bind  
8 him or her to its terms. Instead, a restraining order or  
9 injunction binds individuals "who receive actual notice of it by  
10 personal service or otherwise." Fed. R. Civ. P. 65(d),  
11 incorporated here by Fed. R. Bankr. P. 7065 (emphasis added); see  
12 also NLRB v. Sequoia Dist. Council of Carpenters, 568 F.2d 628,  
13 634 (9th Cir. 1977) (labor union officers were bound by cease and  
14 desist order served only on union's attorney and not on the  
15 officers); Fidelity Mortg. Investors v. Camelia Builders, Inc.,  
16 550 F.2d 47, 52 (2nd Cir. 1976) ("a person is in contempt of  
17 court if he knowingly violates a court order, whether or not he  
18 received a formal notice."); Central States, Southeast &  
19 Southwest Areas Health & Welfare & Pension Funds v. Transcon  
20 Lines, 1995 U.S. Dist. LEXIS 11372, \*22 (N.D. Ill. 1995)  
21 ("constructive notice, namely, less than actual knowledge but  
22 awareness of facts sufficient to cause a reasonable person to  
23

24 \_\_\_\_\_  
25 stated that the tone of his Sunday afternoon telephone  
26 conversation with Salyer caused him to believe Salyer was "not  
intending to cooperate." Transcript of Dec. 18, 2013 hearing,  
filed Jan. 8, 2014, at 7:8-9.

27        In light of this testimony, it is ironic that Lichtenegger  
28 formally substituted in just three weeks later to represent one  
of Salyer's entities, CVS, in connection with the trustee's  
ongoing efforts to learn the whereabouts of the Drum Line.



1 inquire further, is adequate notice to a corporate officer of the  
2 existence of a court order to satisfy due process." ).<sup>22</sup>

3       It is undisputed the TRO was served on Lichtenegger by email  
4 the day it was issued, August 24. Based on that fact and on the  
5 further evidence discussed above, the court is convinced  
6 Lichtenegger knew the TRO had issued (indeed, he testified at the  
7 evidentiary hearing/trial he assumed it had issued), knew what it  
8 provided, and knew it was not moot; that is, he knew the Drum  
9 Line had not left California. Rather than taking "every  
10 reasonable step" to ensure his clients' compliance with the TRO,  
11 he and Rose spent the next week pursuing a strategy they hoped  
12 would give them deniability. Lichtenegger decided not to make an  
13 appearance at the hearing and proceeded to deliberately ignore  
14 his faxes, overnight mail, and emails so he could argue he did  
15 not know for certain the TRO had issued until after the Drum Line  
16 had actually left the Port of Oakland. At the same time, Rose  
17 decided to ignore his mail, emails, and faxes, so he too could  
18 claim he was unaware of the TRO and its provisions, like  
19 Lichtenegger, in an effort to evade compliance with the TRO. In  
20 short, both treated the TRO as a hot potato neither wanted to  
21 touch.

22 / / /

23 / / /

24

25       22. "[W]here a corporate officer knows a court order has  
26 been entered against the corporation, but fails to inquire, as a  
27 reasonable person would, as to the terms of the order, he may  
28 properly be held in contempt. A rule which would allow a  
corporate officer to remain deliberately ignorant of the  
particulars of a court order, and thereby avoid a contempt  
citation, would defy common sense." Central States, 1995 U.S.  
Dist. LEXIS 11372, at \*23.

1 Lichtenegger as a Person Bound by the TRO

2       Lichtenegger claims he was not bound by the TRO because his  
3 relationship with CVS and Salyer was too attenuated. Thus, he  
4 contends he was not an attorney for CVS during the time the Drum  
5 Line was still in California. First, he claims he could not have  
6 been an attorney for CVS because he had not appeared as its  
7 attorney of record in any manner described in LBR 2017-1(b)(2);  
8 thus, under subsection (b)(1) of the same rule, he could not  
9 participate in the action.<sup>23</sup> This rule is intended to govern an  
10 attorney's participation in proceedings in court, not to define  
11 the circumstances under which an attorney-client relationship is  
12 created or the circumstances in which an attorney, as an attorney  
13 for a party, assumes duties of candor and truthfulness to  
14 opposing counsel and the court, as discussed below. Further, the  
15 rule was not designed to shield attorneys from the consequences  
16 of their actions and choices. Thus, the court rejects  
17 Lichtenegger's position.

18       Lichtenegger also relies heavily on the fact that he agreed  
19 to make only a "special appearance" for Rose at the TRO hearing  
20 if he could. However, the record does not support Lichtenegger's  
21 position that what he was doing for Rose, CVS, and Salyer  
22 regarding the Drum Line and the TRO application was limited to  
23 making a "special appearance" that carried no responsibility for  
24 him as an attorney for a party. At the time the Drum Line  
25 incident arose, Lichtenegger was not a stranger to Salyer and his

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26  
27       23. "Except as permitted in Subpart (c) of this Rule [not  
28 applicable here], no attorney may participate in any action  
unless the attorney has appeared as an attorney of record." LBR  
2017-1(b)(1).

1 related entities; he was not someone Rose called out of the blue  
2 to ask for the "favor" of making a special appearance. Instead,  
3 in early August of 2009, Salyer had asked Lichtenegger "to  
4 represent a list of unnamed entities to avoid a conflict by  
5 already engaged attorneys" (Lichtenegger Decl., filed March 21,  
6 2011, at 1:27-28), to develop a new action against BMO regarding  
7 a property at Lake Tahoe, to expunge a lis pendens the trustee  
8 had filed against certain farming properties, and to sign papers  
9 supporting a Rule 12(b)(6) motion in the trustee's substantive  
10 consolidation action. Id. Lichtenegger has testified he signed  
11 those latter papers "on behalf of a number of entities which, at  
12 that time, I knew nothing about (nor was it important for me to  
13 know that detail as the motion was directed at the failure to  
14 state causes of action in the first instance)." Id. at 2:5-7.<sup>24</sup>

15 The court concludes from these facts that Lichtenegger was  
16 part of Salyer's legal team and he was prepared and willing to do  
17 what he was asked by Salyer or other members of his legal team.  
18 This included representing whatever person or entity Salyer, or a  
19 member of his legal team, asked Lichtenegger to represent. The  
20 only reason his prospective appearance at the TRO hearing was  
21 characterized as a special appearance was that if Rose had not  
22 been on vacation, he would have made it. The court believes  
23 that, although they characterized it as a special appearance,  
24 Lichtenegger thought he was working for Salyer and/or one of his

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25  
26 24. On August 17, 2009, four days before the Drum Line  
27 communications began, Lichtenegger signed and filed a motion to  
28 dismiss the trustee's complaint in AP No. 09-2342 as counsel for  
17 Salyer entities, including Monterey Peninsula Farming, LLC  
("MPF"), which according to Rose, was the sole owner of CVS.  
Rose signed the motion as counsel for CVS and two other entities.

1 entities. This conclusion is supported by the series of emails  
2 among Salyer, Putterman, Segal, Pascuzzi, Rose, and Lichtenegger  
3 on August 24 (the day of the TRO hearing) and August 25, in which  
4 Lichtenegger was asked to call the attorney for Olam (purchaser  
5 of SK Foods' business operations from the trustee) and demand the  
6 return of eight color sorters. At one point in this exchange,  
7 Lichtenegger emailed Pascuzzi as follows: "It is not clear to me  
8 who the owner of the 8 color sorters is that I am representing.  
9 Tell me and I will call after lunch." BMO 417 (emphasis added).  
10 In short, the court finds Lichtenegger was part of the Salyer  
11 legal team and viewed himself as such.

12 In that capacity, Lichtenegger deliberately conveyed  
13 information on behalf of Salyer and CVS for the sole purpose of  
14 persuading Carlson to drop the TRO application. He did not  
15 purport to limit his remarks to what he had learned from another  
16 attorney; he stated that he had "investigated" the facts and he  
17 had "confirmed" that the Drum Line was "already gone." An  
18 attorney proposing nothing more than to make a special appearance  
19 for another attorney does not undertake those types of  
20 activities. Then, after he left the voicemail message,  
21 Lichtenegger emailed Salyer, Segal, Pascuzzi, Perry, and Rose,  
22 stating that he and Rose were "dealing with [the Drum Line  
23 situation] now." The court finds that as of Friday afternoon,  
24 August 21, Lichtenegger was an attorney for CVS and Salyer with  
25 regard to the Drum Line and the TRO application, and assumed all  
26 the associated duties and responsibilities, including the duty  
27 not to conceal from the court or opposing counsel material facts  
28 that showed his earlier information was inaccurate (see

1 discussion below), and the duty to take "every reasonable step"  
2 to ensure compliance with the TRO.<sup>25</sup>

3 If all of that is not sufficient to find Lichtenegger was  
4 bound by the TRO (and the court believes it is), the court also  
5 finds that, as discussed above, Lichtenegger, at all times the  
6 TRO was in force, was acting with regard to the Drum Line and the  
7 TRO in concert with Rose, who himself was an agent of and  
8 attorney for CVS, the named target of the TRO (see discussion in  
9 the court's ruling underlying the January 21, 2014 order). As  
10 the TRO bound CVS, its officers, agents, etc., "and those in  
11

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12 25. In an ironic twist, Lichtenegger suggests he may have  
13 had some responsibility to provide further information to the  
14 trustee if Carlson had, in response to his representation that  
15 the Drum Line had already shipped, withdrawn the TRO application.  
16 He states, "Had the Trustee agreed to cancel the TRO hearing  
17 based on Lichtenegger's representation about the Drum Line having  
18 already shipped, [Lichtenegger's] obligations may have been  
19 different, but certainly not when the representation had NO  
20 consequence." Lichtenegger P. & A., filed Sept. 25, 2013  
21 ("Lichtenegger P. & A."), at 11:7-9. This argument, first,  
22 incorrectly assumes an attorney's duty of candor and truthfulness  
23 -- to both opposing counsel and the court, as discussed below --  
24 arises only if he succeeds in hood-winking one or the other.  
25 Second, it incorrectly assumes Lichtenegger's false information  
26 about the shipment caused no harm, whereas, as discussed below,  
27 the court is convinced that had Rose and Lichtenegger not acted  
28 in concert to prevent the trustee from discovering the truth, a  
scheme that began with Lichtenegger's voicemail message to  
Carlson, the shipment very likely would have been stopped.

Although the court made this point in its ruling underlying  
the January 21, 2014 order, at the evidentiary hearing/trial,  
Lichtenegger was adamant that because nothing he did or did not  
do prevented the trustee from obtaining the TRO on Monday  
morning, his conduct had no effect and he should not be penalized  
for it. What he refuses to recognize is that his deliberate  
conduct preceding the issuance of the TRO misdirected the trustee  
and the court as to the whereabouts of the Drum Line and that had  
he taken steps to correct that misdirection, such as by  
contacting Salyer and/or the rest of the legal team or by  
directly correcting the false impression he had given the  
trustee's attorney, the whereabouts of the Drum Line would likely  
have been discovered in time to prevent the shipment.

1 active concert or participation with CVS or with its officers,  
2 agents, [etc.]," Lichtenegger was bound by the TRO. Finally, as  
3 indicated above, Lichtenegger had already appeared in AP No.  
4 09-2342 as attorney of record for MPF, the owner of CVS. For  
5 this reason also, the court concludes Lichtenegger was acting as  
6 an attorney for CVS in the Drum Line controversy, and as such,  
7 was bound by the TRO.

8 Lichtenegger claims that if he was "inadvertently and  
9 unknowingly"<sup>26</sup> put into the position of an attorney for CVS by his  
10 initial phone call to Carlson, he "completely complied with the  
11 duties of an attorney before he withdrew from his favor to  
12 Rose[,] as he did advise [CVS's] agent, Scott Salyer, of the  
13 pending TRO and the consequences of disobeying it." Id. at 2:1-  
14 3. The court cannot conclude that whatever admonition he may  
15 have given to Salyer -- even if Lichtenegger actually made it --  
16 in any way qualified as "every reasonable step" he could have  
17 taken to ensure Salyer's compliance. Assuming Lichtenegger  
18 actually believed Salyer's statement that the shipment could not  
19 be stopped (which the court does not believe), Lichtenegger had a  
20 duty to make at least some effort to determine whether that was  
21 true, rather than simply taking Salyer's word for it.  
22 Lichtenegger does not even pretend he thought Salyer's remark  
23 meant a court order could not have stopped the shipment. He did  
24 not ask Salyer whether a court order could stop it, and he has  
25 suggested no factual scenario or legal theory under which the  
26 shipment of the Drum Line, as of August 24, after the TRO had

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27  
28 26. Lichtenegger Decl. at 1:28.

1 issued, could not have been stopped. The court finds that as of  
2 the time the TRO issued, and through the next seven days, the  
3 shipment could and should have been stopped, and that, had  
4 Lichtenegger not concealed from Carlson and the court that the  
5 Drum Line was still in port "awaiting departure," the shipment  
6 likely would have been stopped.

7 Lichtenegger claims his only obligation in this matter was  
8 his promise to help Rose by appearing specially for him at the  
9 hearing if he could; in Lichtenegger's view, he had no duty to  
10 the trustee or the court. On the contrary, once Lichtenegger  
11 made an affirmative unqualified representation to Carlson that  
12 the Drum Line had shipped and was "already gone," and thus, that  
13 the TRO application was moot, and then learned that those  
14 statements were false, he had a duty to correct the inaccuracy he  
15 had conveyed to Carlson, which, he knew, Carlson had conveyed to  
16 the court. "It is the duty of an attorney . . . : (d) To  
17 employ, for the purpose of maintaining the causes confided to him  
18 or her those means only as are consistent with truth, and never  
19 to seek to mislead the judge or any judicial officer by an  
20 artifice or false statement of fact or law." Cal. Bus. & Prof.  
21 Code § 6068. This subsection "unqualifiedly require[s] an  
22 attorney to refrain from acts which mislead or deceive the  
23 Court." Oliner v. Kontrabecki (In re Cent. European Indus. Dev.  
24 Co.), 51 Bankr. Ct. Dec. 31, 2009 Bankr. LEXIS 639, \*17 (Bankr.  
25 N.D. Cal. 2009), citing Di Sabatino v. State Bar, 27 Cal.3d 159,  
26 162 (1980). "Furthermore, it is settled that concealment of  
27 material facts is just as misleading as explicit false statements  
28 . . . ." Oliner, 2009 Bankr. LEXIS 639, at \*18, citing Di



1 Sabatino, 27 Cal.3d at 183. "These same rules of candor and  
2 truthfulness apply when an attorney is communicating with  
3 opposing counsel." Oliner, 2009 Bankr. LEXIS 639, at \*18, citing  
4 Hallinan v. State Bar, 33 Cal. 2d 246, 249 (1948).

5 In this case, the court concludes Lichtenegger was acting as  
6 attorney for CVS with regard to the Drum Line when he agreed to  
7 make the appearance for Rose, when he contacted Salyer about the  
8 whereabouts of the Drum Line, when he informed Carlson the Drum  
9 Line had shipped and was "already gone" and the TRO was therefore  
10 moot, and when he "dealt with" the Drum Line and TRO issues with  
11 Rose. In fact, Lichtenegger's August 21, 2009, 3:30 p.m. email  
12 to Salyer, Segal, Pascuzzi, Perry, and Rose more accurately  
13 describes the reality of the situation when Lichtenegger lets the  
14 other members of Salyer's legal team know that he and Rose "are  
15 dealing with the [TRO] now." The court concludes Lichtenegger  
16 was acting as an attorney for CVS (and Salyer) with regard to the  
17 Drum Line and the TRO from at least August 21, and as such, he  
18 was bound by the TRO. His belated disclaimer is nothing but a  
19 self-serving attempt to escape his responsibility to take all  
20 reasonable steps to ensure compliance with the TRO.

21 Lichtenegger's Duty to Produce a Witness

22 Finally, BMO contends Lichtenegger violated the TRO when he  
23 failed to produce a corporate designee to testify at a  
24 deposition, within five days after entry of the TRO, about, among  
25 other things, the current location of the Drum Line and any plans  
26 to move it, as the TRO required of CVS and its officers, etc.,  
27 and those in active concert or participation with them.  
28 Lichtenegger reiterates here the argument that he had decided not



1 to accept the representation of CVS and not to appear at the  
2 August 24 hearing; thus, he claims he was under no duty to comply  
3 with this aspect of the TRO. The court has already found  
4 Lichtenegger was bound by the TRO. His alleged failure to have  
5 any contact with Salyer or other members of the legal team is  
6 irrelevant, as he was bound by the TRO to be in contact with  
7 them, to attempt to stop the shipment of the Drum Line, and to  
8 produce a witness knowledgeable as to its whereabouts.

9 Lichtenegger does not claim to have taken any steps to produce  
10 such a witness until September 23, when he formally entered the  
11 litigation as CVS's attorney. As the Drum Line was by then well  
12 on its way to New Zealand, and as Lichtenegger was bound by the  
13 TRO from several days before it left the Port of Oakland, his  
14 efforts after September 23, if any, were too little, too late.

15 The court finds by clear and convincing evidence that  
16 Lichtenegger was working, in concert with Rose, as an attorney  
17 for CVS and was bound by the TRO to produce a knowledgeable  
18 individual for deposition, but failed to do so. Thus, the court  
19 concludes that Lichtenegger failed to comply with this aspect of  
20 the TRO.

#### 21 Miscellaneous Issues

22 Lichtenegger cites the attorney-client privilege, claiming  
23 he could not have told the court in any event that the Drum Line  
24 was still in port. "[A] party asserting the attorney-client  
25 privilege has the burden of establishing the [existence of an  
26 attorney-client] relationship and the privileged nature of the  
27 communication. Because it impedes full and free discovery of the  
28 truth, the attorney-client privilege is strictly construed."

1 United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010)  
2 (citations omitted). Thus, "[t]he party asserting the privilege  
3 bears the burden of proving each essential element." Id. The  
4 elements are eight-fold (id.); Lichtenegger has provided no  
5 analysis, merely an unsupported conclusion; as such, he has  
6 failed to satisfy this burden.

7 For example, the attorney-client privilege apparently did  
8 not prevent Lichtenegger from conveying what Rose wanted him to  
9 convey -- that the Drum Line was already gone and the TRO  
10 application was moot. But when it comes to his responsibility to  
11 correct that wrong information and comply with the TRO after it  
12 issued, Lichtenegger falls back on the privilege. It is entirely  
13 possible in this circumstance that the privilege was waived.  
14 "The privilege which protects attorney-client communications may  
15 not be used both as a sword and a shield. Where a party raises a  
16 claim which in fairness requires disclosure of the protected  
17 communication, the privilege may be implicitly waived." Kaiser  
18 Found. Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033,  
19 1042 (9th Cir. 2009), quoting Chevron Corp. v. Pennzoil Co., 974  
20 F.2d 1156, 1162 (9th Cir. 1992). Lichtenegger has made no  
21 showing regarding the question of waiver, which is one of the  
22 eight elements.

23 Lichtenegger also contends the TRO was a prohibitory  
24 injunction, not a mandatory one, and thus, that it merely  
25 prohibited action and "[did] not compel everyone to which [sic]  
26 the TRO was addressed . . . to take some active step to assist in  
27 enforcement of the TRO." Lichtenegger P. & A. at 15:15-17. In  
28 other words, he claims, the TRO only "prohibit[ed] active conduct

1 and [was] not addressed to passive activity (i.e. doing  
2 nothing)." Id. at 15:24. Thus, "Lichtenegger had no duty to  
3 actively 'ensure' compliance." Id. at 14:17. This argument  
4 represents a misunderstanding of the distinction between  
5 prohibitory and mandatory injunctions.

6 A prohibitory injunction prohibits a party from taking  
7 action and preserve[s] the status quo pending a  
8 determination of the action on the merits. A mandatory  
9 injunction orders a responsible party to take action.  
A mandatory injunction goes well beyond simply  
maintaining the status quo [p]endente lite [and] is  
particularly disfavored.

10 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d  
11 873, 878-79 (9th Cir. 2009) (citations omitted; internal  
12 quotation marks omitted).<sup>27</sup> "[T]he test for whether an injunction  
13 is prohibitory or mandatory can be found in its effect on the  
14 status quo ante litem, which means the last, uncontested status  
15 which preceded the pending controversy." Ariz. Dream Act  
16 Coalition v. Brewer, 2013 U.S. Dist. LEXIS 69603, \*13 (D. Ariz.  
17 May 16, 2013), citing Marlyn Nutraceuticals, 571 F.3d at 879  
18 (emphasis added).

19 Thus, the distinction between the two types of injunctions  
20 is not, as Lichtenegger would have it, that one requires someone  
21 to do something and the other requires someone merely to refrain  
22 from doing something. The test is whether the injunction would  
23 preserve the status quo between the parties as it existed prior  
24 to the controversy. In this case, the status quo between the  
25

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26 27. See also Coffee Dan's, Inc. v. Coffee Don's Charcoal  
27 Broiler, 305 F. Supp. 1210, 1216 (N.D. Cal. 1969) [the question  
28 is "will it merely proscribe a course of action (prohibitory  
injunction) or will it require defendant to take affirmative,  
costly remedial steps (mandatory injunction)."].

1 parties at the time the controversy arose was that the Drum Line  
2 was still in California; it was not on its way to New Zealand.  
3 That is the status quo the trustee sought to maintain when he  
4 applied for the TRO; that is the status quo the court intended to  
5 maintain when it issued the TRO. That preserving that status quo  
6 may have required someone to do something, as opposed to doing  
7 nothing, did not turn the TRO into a mandatory injunction. And  
8 the fact that the TRO was a prohibitory injunction did not mean  
9 that those bound by it had merely to do nothing in order to  
10 comply. To comply with the TRO; that is, to preserve the status  
11 quo of the Drum Line remaining in California, those bound by the  
12 TRO were required to take all reasonable steps to ensure that the  
13 Drum Line remained in California, and that it was not shipped to  
14 New Zealand (or anywhere else outside of California). As  
15 discussed above, Lichtenegger was bound by the TRO and he did not  
16 comply. The court also notes that had Lichtenegger appeared at  
17 the TRO hearing and corrected his false statement to Carlson;  
18 that is, had he informed the court the Drum Line had, in fact,  
19 not shipped and was in the Port of Oakland, the trustee could  
20 have sought an order from the court that would have specifically  
21 prohibited the Drum Line from leaving the Port and preserved the  
22 status quo.

23 Appropriate Sanction

24 BMO requests a sanction in an amount appropriate to  
25 compensate it for the loss of the Drum Line, an outcome the court  
26 concludes could have been prevented if Rose and Lichtenegger had  
27 complied with the TRO. BMO requests an award of \$350,000, based  
28 on the price CVS agreed to pay to SK Foods when CVS purchased the

1 Drum Line in December of 2008. Rose's only challenge to that  
2 value was that an individual named Ruben Gallardo, a  
3 foreman/supervisor for MPF, testified the Drum Line needed  
4 repairs and was not worth fixing. The court's review of  
5 Gallardo's deposition testimony indicates he had never seen the  
6 Drum Line before he was asked to clean and pack it, and he had  
7 almost no understanding of the Drum Line. He did testify that  
8 "to [him] it was all destroyed." BMO 672. He believed it had  
9 been mishandled when it was put into the containers in which he  
10 found it. He said he couldn't say what its value was, but it  
11 would "probably cost more to fix it than -- to repair it, because  
12 it was poorly installed in the containers, damaged." Id. The  
13 court finds that Gallardo (through no fault of his own) was not  
14 qualified to provide an opinion as to the value of the Drum Line.  
15 The court also notes that Salyer, Rose, and Lichtenegger went to  
16 great lengths to maintain possession and control of the Drum Line  
17 and to avoid compliance with the TRO and this conduct is  
18 inconsistent with their assertion that the Drum Line was of  
19 little value.

20 Lichtenegger's approach to the question of the sanction  
21 amount is to refer to the Drum Line as "piles of rusted junk."  
22 Lichtenegger P. & A. at 22:20. At the evidentiary hearing/trial,  
23 he cross-examined BMO's witness, Michael Carlson -- the same  
24 Michael Carlson who was involved in the telephone conversations  
25 and emails of August 21, 2009 -- extensively regarding who had  
26 told him what about the condition and value of the Drum Line.  
27 Carlson responded that whatever information he had received  
28 regarding those matters was received after the fact; that is,

1 after the TRO had been issued and the Drum Line had been received  
2 in New Zealand.

3 Lichtenegger focused heavily on an email to Carlson from Ken  
4 Gifford, managing director of K-Pack International Ltd., the  
5 company in New Zealand that designed and built the Drum Line and  
6 to which the Drum Line was shipped in the fall of 2009. As  
7 Lichtenegger emphasized at the evidentiary hearing/trial, the  
8 email referred to the Drum Line having been vandalized before it  
9 was shipped to New Zealand, to electrical parts have been damaged  
10 or being missing, and to the Drum Line having been "left in a  
11 poor state." James Heiser Decl., filed Jan. 11, 2013, Ex. B to  
12 Ex. 5 (BMO 090). The email was sent by Gifford to Carlson on  
13 November 29, 2009, three months after the Drum Line left the Port  
14 of Oakland.

15 Gifford estimated, in the same email, that the cost to  
16 repair the Drum Line would be about \$400,000 and that the Drum  
17 Line, "complete in restored order made operational would sell for  
18 USD \$1,500,000 as a used/reconditioned production line." (Id.)  
19 Lichtenegger suggested in his questioning of Carlson that only K-  
20 Pack could have repaired the Drum Line and that the trustee would  
21 have had to send it to New Zealand anyway and he suggested the  
22 trustee did not have enough money in the estate to have it  
23 repaired. Mr. Carlson did not have answers to Lichtenegger's  
24 questions on this issue and Lichtenegger offered no other  
25 evidence. The bottom line is that Lichtenegger's line of cross-  
26 examination called for nothing but unsupported speculation, to  
27 which the court gives little or no weight.

28 / / /

1       At the evidentiary hearing/trial, Lichtenegger also  
2 suggested the cost to have the Drum Line shipped back to  
3 California would have been relatively modest -- less than \$50,000  
4 -- and that the trustee should have mitigated his damages by  
5 doing that. However, this court has previously found that the  
6 return of the Drum Line would have been impractical under the  
7 circumstances. See final ruling on DC No. TJD-5, filed Feb. 13,  
8 2013 in this adversary proceeding. Finally, the court must  
9 question why, if the cost to return the Drum Line were so low,  
10 Lichtenegger and Rose, having by their failure to comply with the  
11 TRO enabled it to leave the country, did not themselves try to  
12 retrieve it from New Zealand.

13       As already determined, it was Rose's and Lichtenegger's  
14 conduct, acting in concert with Salyer, that resulted in the Drum  
15 Line being shipped out of California in the first place; it was  
16 their subsequent failure to produce a knowledgeable witness that  
17 resulted in the trustee not learning of its whereabouts until two  
18 and one-half months later, after he had incurred significant  
19 attorney's fees and costs.

20       "The most elementary conceptions of justice and public  
21 policy require that the wrongdoer shall bear the risk of the  
22 uncertainty which his own wrong has created.'" Universal  
23 Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 369 (9th Cir.  
24 1947), quoting Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251,  
25 265 (1946).

26       'The fact that personal property which is injured or  
27 destroyed by the wrongful or negligent act of another,  
28 has no market value, does not restrict the recovery to  
nominal damages only; its value or the plaintiff's  
damages must be ascertained in some other rational way

1 and from such elements as are attainable. In such case  
2 the proper measure of damages is generally its actual  
3 value or its value to the owner. The value of an  
4 article may be shown by proof of such elements or facts  
as may exist- such as its cost, the cost of  
reproduction or replacing it, its utility and use . . .

5 Universal Pictures Co., 162 F.2d at 370 (citation omitted).

6 This principle has been applied in the bankruptcy context.  
7 In Lundell v. Ulrich (In re Lundell), 236 B.R. 720 (9th Cir. BAP  
8 1999), the trustee sought damages based on an alleged decline in  
9 value of certain stock during the time he was trying to obtain  
10 the stock from the debtors. As against the defendants' claims  
11 regarding the appropriate method for measuring damages, the Panel  
12 agreed with the trustee's approach, finding that "the difficulty  
13 in calculating the damages [was] due in large part to the  
14 malfeasance of the Debtors." 236 B.R. at 725.<sup>28</sup>

15 In short, Lichtenegger's arguments that the Drum Line had no  
16 value are not supported by the evidence; further, the difficulty  
17 of fixing the value of the Drum Line was created by his conduct,  
18 acting in concert with Salyer and Rose, in failing to comply with  
19 the TRO. Finally, the court has previously entered judgment  
20 against CVS in this adversary proceeding in an amount well in  
21

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22 28.

23 Where a defendant by his own wrong has prevented a more  
24 precise computation . . . [the factfinder] may make a  
25 just and reasonable estimate of the damage based on  
26 relevant data, and render its verdict accordingly. . .  
27 . Any other rule would enable the wrongdoer to profit  
28 by his wrongdoing at the expense of his victim. It  
would be an inducement to make wrongdoing so effective  
and complete in every case as to preclude any recovery,  
by rendering the measure of damages uncertain.

Id., quoting Bigelow, 327 U.S. at 264-65.



1 excess of the \$350,000 BMO is seeking here.<sup>29</sup> In these  
2 circumstances, the court is satisfied that the value of the Drum  
3 Line, for purposes of fixing the amount of appropriate sanctions  
4 against Lichtenegger, was at least \$350,000, the price at which  
5 Salyer and Rose, acting for CVS, agreed it would be sold by SK  
6 Foods to CVS. (As already indicated, the amount of the sanction  
7 has been reduced in part by Rose's settlement payment.)

8 To conclude, the clear and convincing, in fact compelling,  
9 evidence in this matter supports the conclusions that  
10 Lichtenegger, in active concert and participation with CVS,  
11 through its agent Salyer and its attorney Rose, and as an  
12 attorney on behalf of CVS and Salyer, was bound by the TRO, which  
13 was a specific and definite order of this court, and that  
14 Lichtenegger failed to take all reasonable steps to ensure that  
15 CVS and Salyer, the latter acting on behalf of CVS, owner of the  
16 Drum Line, complied with the TRO. The court reaches these  
17 conclusions after having heard Lichtenegger's oral testimony at  
18 the evidentiary hearing/trial and having observed his demeanor  
19 and assessed his credibility. In short, the court's original  
20 findings, analysis, and conclusions, as set forth in the court's  
21 original ruling on BMO's motion for summary judgment, remain  
22 unchanged by the testimony submitted at the evidentiary  
23 hearing/trial. The court finds, by clear and convincing  
24 evidence, that Lichtenegger's strategy from August 21 forward was  
25


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26 29. On BMO's motion for summary judgment against CVS, the  
27 court entered judgment against CVS in the amount of \$1,500,000,  
28 the value of the Drum Line at the time of the transfer in  
question in that motion. That judgment has been affirmed on  
appeal.

1 to ignore the TRO so he could later claim, as he does now, he was  
2 not responsible.

3 For the reasons stated, the judgment against Lichtenegger  
4 will stand, as partially reduced by Rose's payment. The court  
5 will issue an order.

6 **Dated:** February 06, 2018

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9 **Robert S. Bardwil, Judge**  
10 **United States Bankruptcy Court**  
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**Instructions to Clerk of Court**  
**Service List – Not Part of Order/Judgment**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the U.S. Mail.

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